
(1984) 04 CAL CK 0004
In the Calcutta High Court
Case No : S.A. No. 20 of 1972

Mohur Alies Mohan Lal Dey and Others APPELLANT
Vs
Sudhir Chandra Dey and Others RESPONDENT

Date of Decision : 09-04-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8

Citation : 88 CWN 864

Hon'ble Judges : A.K. Sengupta, J

Bench : Single Bench

Advocate : Sudhir Kumar Acharya, for the Appellant; Shyama Prasanna Roy Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Ajit Kumar Sengupta, J.—This is an appeal from the judgment and decree of the learned Subordinate Judge, Hooghly affirming, the judgment and decree of the learned Munsif of Arambagh. The suit out of which this appeal arises is a representative suit filed by the plaintiffs on their own behalf as well as on behalf of the inhabitants of village Khorda Kanpur. The plaintiff No. 1, Mohan Lal Dey is the nephew of defendant No. 1, Sudhir Chandra Dey. The plaintiff No. 2, Chandra Kanta Dey is the brother of defendant No. 1, The dispute is with regard to the right, if any, of the plaintiffs and the Hindu villagers of the said village to use the land described in Schedule "Ka" of the plaint measuring 2.72 acres of plot No. 45/1566 under khatian No. 73 being the banks of a tank called Dulapukur at plot No. 45 of the said khatian. The land described in Schedule "Kha" of the plaint is a piece of land on which the defendant Nos. 2 to 4 had been residing and which forms the part of the land described in Schedule "Ka". It is the case of the plaintiffs that the Hindu villagers of the said village had been using the land in dispute as the cremation ground since time immemorial and they have acquired the right to use the land in dispute as the cremation ground by reason of lost grant and custom. The tank at plot No. 45 was formally an abandoned tank and

the same had recently been re-excavated and improved by the defendant No. 1 under the provision of the Bengal Tanks Improvement Act, 1939. It is also the case of the plaintiffs that the Hindu villagers had been using the water of the said tank and the bamboos and other trees grown at or near the suit land in connection with the cremation. It has been further alleged that earth removed from the said tank was thrown upon the cremation ground and a portion on the south of the suit land was brought under cultivation by the defendant No. 1 and the said defendant was trying to convert the rest of the cremation ground into arable land. It has also been alleged that with that end in view, the defendant No. 1 inducted the defendant Nos. 2 to 4 on the south western corner of the cremation ground where the defendant Nos. 2 to 4 had been temporarily residing by constructing huts. It has also been alleged that the villagers had acquired an indefeasible right to use the suit land as the cremation ground which had been denied by the defendant No. 1. It has also been alleged that no other land would be available to the members of the Hindu community of the said village to burn the dead bodies of adult persons or to bury the dead bodies of infants. Hence the suit was instituted by the plaintiffs to obtain a declaration that the land in dispute is the cremation ground of the Hindu inhabitants of the village Khorda Kanpur and they have the right to use the bamboos and trees growing on the suit land for the purpose of the cremation and for permanent injunction restraining the defendants from interfering with the right of the villagers to burn or bury the dead bodies as the case may be on the suit land and from converting the suit land into arable land and from making any cultivation on the suit land. They have also asked for eviction of the defendant Nos. 2 to 4 from the suit land. The defendants have denied that the Hindu villagers had been using the disputed land as cremation ground since time immemorial or they acquired any right whatsoever to use the land as crematorium as claimed. The defendant No. 1 further alleged that he had taken settlement of more than one acre including a tank and the suit land from the Maharaja of Burdwan in 1941 and since then he had been possessing the same. It is the case of the defendant No. 1 that a portion of the disputed land was being used as a private family crematorium of the members of the Dey family and in another portion the defendant No. 1 had been growing crop. It is alleged that the defendant No. 1 inducted the defendant Nos. 2 to 4 in a portion of the suit land where the defendant Nos. 2 to 4 had been residing as licensees under the defendant No. 1. It is the case of the defendant Nos. 2 to 4 that they are the licences under the defendant No. 1 and they are not liable to be evicted on the prayer of the plaintiffs.

2. As many as 7 issues were framed by the learned Munsif. Issue No. 4 which is the main issue, was to the following effect :--

Are the plaintiffs entitled to get the declaration that the suit property is the cremation ground of the Hindu inhabitants of village Khorda-Kanpur? Can the villagers use the trees and bamboos growing in natural course on the suit land for the purpose of cremation ?

3. Although the claim of the plaintiffs was based on the lost grant as well as on custom, in the course of hearing, the plaintiffs abandoned the claim that they had acquired the right on the disputed land on the basis of lost grant. The learned Munsif, therefore, considered the question whether the requisites of a valid custom had been proved in the instant case.

4. The learned Munsif found that the land in dispute was the banks of a tank which was recently improved and admittedly a portion of the suit land had been put under cultivation and in another portion thereof, the defendant Nos. 2 to 4 had been residing by erecting structures thereof. He held that the essential requisites of customary right claimed by the plaintiffs had not been specifically pleaded. Referring to the evidence of the defendant No. 1 who said in his deposition that about two cottahs of land on the north east corner of the suit land had been set apart, for the purpose of cremation of the members of the Dey Family, he negatived the contention of the plaintiffs that the defendants had admitted the claim of the plaintiffs in their evidence. He considered the entries in the C.S. and R.S. record of rights where the land in dispute was shown as Cremation ground for the use of Hindu public in general. The learned Munsif held that although the entries in the C.S. and R.S. record of rights raised some presumption in favour of the plaintiffs, but the evidence adduced in the suit failed to rebut the said presumption. He also noted the fact that according to the report of the commissioner the suit land did not appear to be a cremation ground although there was some sign of cremation of a dead body on a small portion of the western side of the suit land. According to him the best witnesses were not examined. He held that the existence of custom as claimed by the plaintiffs was not proved and in any event neither the customary right claimed by the plaintiffs was reasonable at its inception nor in the changed circumstances of the case. The learned Munsif took into consideration the fact that there are other public cremation grounds in the village. He was also of the view that the plaintiffs have no right to take away the trees and bamboos which are the properties of the owner of the soil. The learned Munsif, therefore, answered the Issue No. 4 against the plaintiffs and dismissed the suit.

5. In the appeal preferred by the plaintiffs, it was urged that the plaintiffs had acquired the right to use the disputed land as cremation ground on the basis of the lost grant and on the basis of custom as well. Having regard to the evidence on record as well as the facts and circumstances of the case, the learned Subordinate Judge was of the opinion that the plaintiffs had failed to have acquired any right as claimed either by way of lost grant or by custom. He held that the doctrine of lost grant has no application to a case where the right is claimed by a fluctuating and unascertained body of persons; The learned Subordinate Judge went into the evidence and held that long or uninterrupted user required for a valid custom was not proved. He found that there are other cremation grounds for the use of the Hindus where the dead bodies of many Hindus had been cremated. From the Census Report of 1960-61 it appears that the total population of the village Khorda-Kanpur was little over 500. He also

took into consideration the suggestion and denial of the fact that the plaintiff No. 1 caused the suit to be instituted against the defendants as he was bearing a grudge against the defendant No. 1 having failed to compete with him when the derelict tank of plot No. 45 after being exeavacated and improved by the State Government under the Bengal Tanks Improvement Act, 1939 was auctioned. He also held that evidence indicated that a portion of the disputed land was used as private family crematorium of the Dey family. He thereafter, considered the question with regard to the presumption in entries in C.S. and R.S. record of rights. According to the learned Subordinate Judge, there was no evidence that after the C.S. Operation, the suit land continued to be used as a cremation ground. On the contrary evidence is that the defendant No. 1 took settlement of the suit land from the Maharaja of Burdwan in 1941 and the suit land formed part of the joint family property of the defendant No. 1 and the father of the plaintiff No. 1 and other co-sharers. The learned Subordinate Judge disbelieved that the Dey family took settlement of the suit land from the Maharaja of Burdwan for use as cremation ground of the Hindu villagers or that the Dey family after taking the settlement allowed the same to be used as such. He held that even if at the time of C.S. operation, the disputed land was used for cremation purpose, there had been a clear break in the continuity for a long time and as such the custom had lost its validity. He held that the customary right as claimed by the plaintiffs over the disputed land is not reasonable because the four banks of the disputed land would be more than 8 bighas and such a vast area could not be required by the Hindus of a small village for their use as their burning ground. He also held that there are other cremation grounds where Hindus of the village actually burn their dead bodies. He, therefore, held that the plaintiffs have not acquired any right to use the dispute land as the crematorium either by way of lost grant or by way of custom. He, therefore, affirmed the judgment and decree of the learned Munsif.

6. Mr. Acharya, the learned counsel appearing on behalf of the plaintiffs-appellants contended that the learned Munsif as well as the learned Subordinate Judge erred in law in not considering the evidence of the witnesses of the plaintiffs which established beyond any doubt that the disputed land was used as a cremation ground. It is his contention that the evidence of the defendant No. 1 amounted to admission that the suit plot was a cremation ground used by the villagers of the locality and the suit should have been decreed on that ground alone. He further contended that the learned Subordinate Judge erred in law in not holding that the presumption of correctness of the entries in C.S. record of rights as well as revisional records had not been rebutted by any legal evidence in this case. It is his contention that the Courts below erred in law in not holding that the presumption as to correctness of the entries in the records of rights in favour of the plaintiffs stood unrebutted. Mr. Acharya has relied on a judgment of this Court in the case of Purna Chandra Ghose and Another Vs. Durlav Chandra Ghosh and Others, in support of his contention that the Court of first instance and the first appellate Court should have drawn the conclusion in favour of the

plaintiffs from the entries in the C.S. and R.S. records where the suit land is recorded as cremation ground for use of the Hindu public. He, therefore, submits that the appeal should be allowed.

7. Mr. Roy Chowdhury, the learned Counsel appearing for the respondents, has supported the finding and the reasoning of the Courts below. It is his contention that both the Courts had duly considered the evidence on record and thereafter came to the finding that no customary right as alleged by the plaintiffs was proved. He has also submitted that the evidence of the witnesses of the plaintiffs does not show that a portion of the suit land was being used as a cremation ground of the Hindu villagers in general. Even assuming that a few persons not belonging to the Dey family were cremated there the same was done with the permission of the Dey family and not as a matter of right. He submits that no grounds have been made out for interference with the judgment appealed from. He has relied on the decisions cited before the Court of first instance and the first appellate Court.

8. The plaintiffs built the case of acquisition by the Hindu public a right to use the disputed land as cremation ground on the basis of the lost grant and also on the customary right. Although before the learned Munsif, the case of lost grant was abandoned, the same was allowed to be urged by the first appellate Court. The first appellate Court, however, held that the appellants had not acquired any such right claimed by the plaintiffs in pursuance of lost grant. In *Rai Kiran Chandra Roy Bahadur vs. Srinath Chakravarti* reported in 31 C.W.N. 135 this Court held that it is only in case of long possession under the claim of a definite right that the question of presumption of a lost grant arises. Where there is an assertion of a right based on lost grant, it must be clearly established first that there has been a long possession and secondly such possession was being enjoyed under a definite claim of right. In this case the plaintiffs have not adduced any evidence to show long possession far less under a definite claim of right. There is no fact found by the Courts below for presuming the existence of lost grant. That is not all. The present suit has been instituted under Or. 1 Rule 8 of the Civil Procedure Code. It is a representative action on behalf of the Hindu villagers claiming a right to use the disputed land as a cremation ground. This Court in the case of *Asrabulla vs. Kiamutulla Haji* reported in 41 C.W.N. 503 held that there cannot be any presumption of a lost grant in favour of the inhabitants of a particular village. At page 507 this Court observed thus :--

.....We are of opinion that no lost grant could be presumed in favour of fluctuating and unascertained body of persons who constitute the inhabitants of a particular village.

The Supreme Court in the case of *Raja Braja Sundar Deb Vs. Moni Behara and Others*, cited with approval the principles laid down in *Asrabulla v. Kiamutulla* (Supra). At page 251 of the Report, the Supreme Court observed thus :-

We find it difficult to uphold the view of the High Court that the defendants were

in possession of the disputed fishery under a lost grant. This doctrine has no application to the case of inhabitants of particular localities seeking to establish rights of user to some piece of land or water. As pointed out by Lord Radcliffe in *Lakshmidhar Misra v. Rangalal*, AIR (37) 1950 P.C. 56 (29) Pat. 1, the doctrine of lost grant originated as a technical device to enable title to be made by prescription despite the impossibility of proving immemorial user and that since it originated in grant, its owners, whether original or by devolution, had to be such persons as were capable of being the recipients of a grant and that a right exercisable by the inhabitants of a village from time to time is neither attached to any estate in land nor is it such a right as is capable of being made the subject of a grant, there being no admissible grantees.

For the aforesaid reasons, the contention based on lost grant must fail.

The only other point remains to be considered as to whether the plaintiffs have succeeded in establishing the right of user of the disputed land as cremation ground by the Hindu inhabitants of the village by custom. Custom of a particular locality can confer a particular right to the inhabitants of a village. This Court in the case of *Jamil Khatun Vs. Kssetra Mohan Biswas and Others* held that a custom of cremating or burying the dead on a piece of land which is the abandoned bank of an abandoned tank is not unreasonable; and if the other requirements of a valid custom are established, such a customary right can be acquired. The requisites of custom are that it should be ancient and invariable, uniform, reasonable, not immoral, certain and consistent. About its being ancient it must have existed "so long that the memory of man runneth not to the contrary" (See *Nitya Gopal Banerjee vs. Provas Chandra Mukherji and others* reported in 31 C.L.J. 37). In *Gopal Krishna Sil v. Abdul Samad Chaudhuri* reported in 34 C.L.J. 319, Sir Ashitosh Mookherjee dealing with question whether a customary right of user of a place as a burial ground or a cremation ground may be acquired observed at page 322 as follows:--

Before such a custom can be recognised, it will be necessary to investigate whether it possesses what has been considered as the essential attributes of a custom, namely, that it must be immemorial, it must be reasonable, it must have continued without interruption since its immemorial origin, and it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect : *Mahamaya vs. Haridas*, 20 C.L.J. 183.

9. There are two questions to be decided which are inextricably connected. First, the proof of custom and secondly its validity, if proved. Although in the plaint a case has been made out of acquisition of a customary right to burn or bury the dead bodies as the case may be in the suit land, all the essential requisites of custom have not been specifically pleaded. In *Gopal Krishna Sil v. Abdul Samad Chaudhuri* (Supra) this Court held --

But it is indispensable that when a customary right is claimed, it should be

specifically pleaded; all the essential requisites" to its validity and binding effect must be averred and the custom so pleaded must when put in issue be proved as laid. (34 C.L.J. 322).

10. The concurrent finding of fact is that a long or continuous user of the disputed land as a cremation ground by the Hindu villagers as alleged by the plaintiffs was not proved. Here, Mr. Acharya has joined issue. He submits that all the witnesses on behalf of the plaintiffs have deposed that the Hindu villagers have been enjoying the right to use the disputed land as a cremation ground continuously at least for the last 40 years or more. Mr. Acharya has further submitted that the said fact has been admitted by the defendant No. 1 in the written statement as well as in his deposition, I am unable to accept the contention of Mr. Acharya. The admission which has been made by the defendant No. 1 in the written statement and in his deposition is that a portion of the disputed land was used as a private cremation ground of the Dey family to which the plaintiffs No. 1 and 2 and the defendant No. 1 belong. The suit land formed part of the joint properties of the defendant No. 1 and the father of the plaintiff No. 1 and other co-sharers. The said fact has also been admitted by the witnesses for the plaintiffs. But then Mr. Acharya contends that from the evidence of the witnesses of the plaintiffs, it would appear that the suit land was also used as a cremation ground not only by the members of the Dey family but also other Hindu villagers on many occasions. It is in evidence that the dead bodies of some persons not belonging to the Dey family were burnt on the suit land. That by itself does not prove that Hindu public at large acquired the right to burn or bury their dead on the suit land. In my judgment, the right claimed must be justified by the evidence. There is no evidence of continuous user as of right. When something is done as of right, it means that the person doing it believes himself to be exercising a right. "No witness was asked whether any one was exercising a right or was merely doing something with leave of the owners of the land. The evidence here does not show that any right was exercised by or on behalf of the inhabitants of the village. No witness said that the user of the land for the purpose of burning or burying the dead by some persons other than the members of the Dey family was as of right or with the belief that the Hindu inhabitants of the village were entitled to do so. The reasonable conclusion which flows from the evidence is that the user of the disputed land as a cremation ground on some occasions by persons not belonging to Dey family was not as of right but with the leave of the owners of the suit land. It was not a customary right but only a licence or privilege. Long enjoyment in order to establish a right must have been as of right.

11. It is convenient to refer to a few facts in this connection to emphasise that in this case no right was exercised by the Hindu public at large over the suit land to burn or bury their dead thereat. From the evidence it appears that even in 1960-61, the total population of the village was little over 550 and there were at least two other cremation grounds which were used by the Hindu public at large. The tank called Dulapukur on plot No. 45 and also its banks i.e. the disputed land

on plot No. 45/1566 were previously held by one Chandi Charan Roy, since deceased, as an occupancy raiyat under the landlord, Maharajadhiraj of Burdwan. These lands became khas of the Zamindar and subsequently the defendant No. 1 took settlement of the same from the Maharajadhiraj of Burdwan in October, 1941. These lands formed part of the joint properties of the defendant No. 1 and the plaintiffs No. 1 and 2 and other co-sharers. The plaintiff No. 1 is the nephew of the defendant No. 1 and the plaintiff No. 2 is the brother of the defendant No. 1. In the absence of any evidence it is hard to believe that the Dey family took settlement of these lands for being used as a cremation ground. On the contrary, it is in evidence that after the defendant No. 1 obtained settlement of the land from Maharajadhiraj of Burdwan in 1941, the defendant No. 1 started growing crop on a portion of the disputed land. Panchanan Roy, a cousin of the said Chandi Charan Roy came as witness No. 2 for the plaintiffs. He has said that Roy family has also a private family cremation ground in plot No. 1044 which was exclusively meant for Roy family. If the Roy family could have an exclusive private cremation ground for their members, there is no reason why Dey family could not have a private cremation ground for their exclusive use. Having regard to the fact that in a village with a population of 550 there were at least two public and one private cremation grounds where the Hindus cremated or buried their dead, and having regard to the evidence on record it cannot be presumed that the suit land was also used by the Hindus as a public cremation ground. In my judgment, on the facts and in the circumstances of the case, the Court of the first instance and the first appellate Court were justified in holding that the suit land was not used as a cremation ground by the Hindu public at large.

12. The learned Subordinate Judge also considered the question whether the custom as claimed by the plaintiffs is reasonable. If a custom is unreasonable, then it must be valid. In *Asarbulla vs. Kiamaiulla Haji*, this Court held (41 C.W.N. 507) that a question as to the reasonableness or otherwise of a custom is a question of law and it is open to the High Court in the Second Appeal to look into the facts found by the lower Appellate Court for the purpose of deciding as to whether a custom alleged is reasonable or not. "The period for ascertaining as to whether the custom is reasonableness or not is certainly the period of its inception." It has been urged that it could not be reasonable to invade somebody else's land and cremate or bury dead bodies there. In *Jamila Khatun vs. Kshetra Mohan* (51 C.W.N. 181) this Court observed thus :--

There remains, however, the question of reasonableness. Mr. Chatterjee argued with some plausibility that it could not be reasonable to invade some body else's land and cremate or bury dead bodies there. Stated broadly in that fashion, that proposition would appear to be correct. But one has to judge the present case in the context of its own facts. The finding here is that the two plots of land are situated on two banks of an ancient tank which was excavated by someone at some date which is unknown. The banks of that tank, although they may have belonged to some one, were never brought under actual possession and were

allowed to run wild and any one who chose might cut and remove the grass that grew thereon. Here was apparently one of those old abandoned tanks, of which one sees so many in Bengal, and the abandoned banks of an abandoned tank. With respect to lands of this character, it cannot be -said that if it is used for the purpose of cremating the dead bodies of the people of the locality, or for the burial of their dead infants, the custom would be unreasonable. There would really be no invasion of the right of property of any one, because whoever the real owner might be, did not obviously treat the property as an asset of his in any real sense.

13. This is not however the case here. In our case the suit land is the banks of a tank which had been excavated and improved. A portion of the suit land was brought under plough. In another portion thereof the defendant Nos. 2 to 4 had been residing by erecting structures thereon. The settlement of the suit land was obtained in 1941 by the defendant No. 1 from the Maharajadhiraj of Burdwan. The suit land formed part of the joint properties of the Dey family. The real owner treated the property as an asset as would appear from the fact set out hereinabove. There would, therefore, be invasion of the right of the property of the defendant No. 1. In this context, it cannot be said even if there was such a custom, it was or could be reasonable.

14. In my judgment the alleged custom is not also reasonable from another point of view. If a contemporary standard of reasonableness is adopted, even then the use of the land consisting" of about 8 bighas for a cremation ground in a village consisting of population of little over 500 and at least having two public cremation grounds, is unreasonable and not beneficial to the inhabitants of the village. Such alleged custom cannot be held to be reasonable in the context of facts which happened after the defendant No. 1 took settlement of the suit land in 1941. A portion of the suit land had been brought under cultivation and another portion was being used by the defendant nos. 2 to 4 for residential purpose by erecting (temporary structures thereon. The suit land was no longer abandoned banks of an abandoned tank. The tank was excavated and improved and a portion of the land had been made arable. Even assuming there is an alleged customary right to burn or bury the dead it cannot be extended to the entire suit land. The defendant No. 1 himself admitted that a portion of the suit land measuring about 2 cottahas was earmarked as a private cremation ground of the Dey family. The reasonableness of a custom has to be judged not only at its inception but also in the context of changed circumstances. Even an ancient customary right alters with the times. In the context of scarcity of agricultural land, the use of the entire land of 8 bighas as a cremation ground when admittedly in the small village in question there are at least two public cremation grounds in use, cannot held to be reasonable.

15. The last but not the least contention of Mr. Acharya is that the entries in C.S. and R.S. Record of rights are to be presumed as correct. In the C.S. and R.S. record of rights the disputed land has been shown as cremation ground for use

by the Hindu public. He, therefore, contends that the learned Courts below should have drawn the conclusion on the basis of the entries in the said record of rights supported by the oral evidence of the witnesses for the plaintiffs. The Courts below have proceeded erroneously in not considering the said record of rights and the oral evidence of the witnesses. This contention of Mr. Acharya has no substance. Both the Courts below have considered the contentions of the plaintiffs based on the entries in the C.S. and R.S. record of rights but the Courts below hold that although the entries raised some presumption in favour of the plaintiffs but the presumption was not proof and the evidence disclosed no foundation for them. In my judgment, the Courts below came to a correct conclusion. This Court in the case of Rai Kiran Chandra Roy Bahadur and ors. vs. Srinath Chakravarti and ors. (Supra) held that the entry in the record of rights must be presumed to be correct unless the contrary is proved, but when the matter is investigated by the Civil Court and the parties adduce evidence on the point in controversy the entry loses its weight when the evidence discloses no foundation for it. As indicated earlier, in this case the parties adduced evidence in support of their rival contentions and upon the evidence the Courts below found that no customary right was established by the plaintiffs. The witnesses for the plaintiffs themselves were not old enough to prove any long user of the suit land as a cremation ground. It has not been established that the alleged custom commenced from time immemorial nor there was any evidence that the alleged custom continued without interruption. Whatever might have been the position prior to C.S. operation during 1930-34, there has been a break in the continuity at least since 1941 when the settlement of the suit land was obtained by the defendant No. 1 from Maharajadhiraj of Burdwan. The alleged custom was neither continued from time immemorial without interruption nor was enjoyed continuously. Even otherwise the alleged custom to burn or bury the dead on the suit land on some occasions by some Hindu inhabitants was not as of right but was under licence or privilege. The custom alleged was neither reasonable at its inception nor was it reasonable at the material time. When a custom is unreasonable it follows that it did not result from any right but must have resulted from accident or indulgence because how would not sanction the continuance of or practice in itself. The concurrent finding of fact is that none of the essentials of a valid custom has been established and no grounds have been made out for interference with the said finding.

The appeal, therefore, fails and is dismissed with costs.